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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Bahig Saliba,

10 Plaintiff,

11 v.

12 Allied Pilots Association,

13 Defendant.  
14

No. CV-22-01025-PHX-DLR

**ORDER**

15  
16 At issue is Defendant Allied Pilots Association's ("APA") motion to dismiss  
17 Plaintiff Bahig Saliba's complaint (Doc. 9), which is fully briefed (Docs. 12, 15). For  
18 reasons explained below, APA's motion is granted, and this case is dismissed.

19 **I. Background<sup>1</sup>**

20 Saliba is a pilot employed by American Airlines ("American"). APA is the union  
21 that represents American's pilots. Though Saliba is not a member of the union, he is in a  
22 bargaining unit represented by APA.

23 During the COVID-19 pandemic, American adopted a policy requiring passengers  
24 to wear masks during flights and requiring employees to wear masks while at work. Pilots  
25 were required to wear masks while facing passengers but were not required to wear a mask  
26 in the flight deck. APA supported American's mask policy and encouraged its pilots to  
27 comply.

28 <sup>1</sup> The following background is based on the allegations in Saliba's complaint (Doc. 1) along with documents properly subject to judicial notice.

1 American's internal mask policy was only one of many mask mandates that applied  
2 to air travelers during the pandemic. For example, Executive Order 13998 imposed a  
3 federal mask mandate for air travel. And the Federal Aviation Administration ("FAA")  
4 issued guidance mirroring the executive order.

5 On December 6, 2021, Saliba approached a Transportation Security Administration  
6 ("TSA") checkpoint without a mask. The TSA officer asked him to wear one, but he  
7 refused. The TSA officer contacted airport police, and Saliba told the officers that he was  
8 exempt from the mask mandate because, in his personal judgment, wearing a mask could  
9 compromise his fitness for duty. After a brief detention, Saliba was released, still not  
10 wearing a mask.

11 Airport police reported the incident to American, after which Saliba was removed  
12 from active flying duty and placed on administrative leave pending disciplinary action. On  
13 December 9, 2021, American informed Saliba that it was proposing disciplinary action  
14 against him. A hearing on that proposal was held on January 6, 2022. And in the month  
15 leading up to hearing, Saliba exchanged numerous emails with APA's in-house lawyer,  
16 Rupa Baskaran. Saliba insisted that APA both represent him at the hearing and argue his  
17 preferred defense, which was that Federal Aviation Regulation ("FAR") § 61.53 gave him  
18 unilateral authority to determine whether to wear a mask. Ms. Baskaran explained to Saliba  
19 that APA will represent him at the hearing, if he so chooses, but APA would not advance  
20 Saliba's preferred defense because APA agreed with American's mask policy and  
21 disagreed with Saliba's idiosyncratic reading of FAR § 61.53. Ms. Baskaran also explained  
22 to Saliba that, if he does not affirmatively elect APA representation, he may represent  
23 himself at the hearing and advance whatever arguments he would like. Saliba never  
24 affirmatively elected APA representation

25 During the disciplinary hearing, Saliba was given an opportunity to, and in fact did,  
26 argue his FAR § 61.53 defense. He also acknowledged that, on December 6, 2021, he was  
27 not wearing a mask at the TSA checkpoint. Ultimately, a written advisory was placed into  
28 Saliba's personnel file regarding his failure to comply with American's mask policy. With

1 APA's assistance, Saliba filed a grievance challenging American's decision to issue a  
2 written advisory. Those administrative proceedings remain ongoing.

3 In the meantime, Saliba filed this action against APA, accusing it of violating its  
4 statutory duty of fair representation by not opposing American's mask policy and not  
5 advancing Saliba's preferred defense at this disciplinary hearing. Saliba also accuses APA  
6 of violating 18 U.S.C. § 242, which criminalizes certain deprivation of constitutional rights  
7 under color of state law, 42 U.S.C. § 1983, which provides civil remedies for the same, and  
8 14 C.F.R. § 91.11, an FAA regulation that prohibits interference with an airplane crew  
9 member's performance of their duties. APA has moved to dismiss all claims.

## 10 II. Legal Standard

11 When analyzing a complaint for failure to state a claim to relief under Federal Rule  
12 of Civil Procedure 12(b)(6), the well-pled factual allegations are taken as true and  
13 construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d  
14 1063, 1067 (9th Cir. 2009). Legal conclusions couched as factual allegations are not  
15 entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and  
16 therefore are insufficient to defeat a motion to dismiss for failure to state a claim, *In re*  
17 *Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). Nor is the Court required to accept  
18 as true "allegations that contradict matters properly subject to judicial notice," or that  
19 merely are "unwarranted deductions of fact, or unreasonable inferences." *Sprewell v.*  
20 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). To avoid dismissal, the  
21 complaint must plead sufficient facts to state a claim to relief that is plausible on its face.  
22 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard "is not  
23 akin to a 'probability requirement,' but it asks for more than a sheer possibility that a  
24 defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at  
25 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's  
26 liability, it 'stops short of the line between possibility and plausibility of entitlement to  
27 relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

### 1           **III.     Analysis**

2           Saliba's claims under §§ 242, 1983, and 91.11 fail as a matter of law. Section 242  
 3 is a criminal statute that does not provide a private civil right of action. *See Allen v. Gold*  
 4 *Country Casino*, 464 F.3d 1044, 1048 (9th Cir. 2006). Section 1983 provides a civil right  
 5 of action, but only against those acting under color of state law. APA is a union, and  
 6 generally "[u]nions are not state actors; they are private actors." *Hallinan v. Fraternal*  
 7 *Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 815 (7th Cir. 2009). Although there  
 8 are some limited circumstances under which the conduct of an otherwise private actor may  
 9 be deemed state action, *see Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003), none  
 10 of those limited circumstances are present here. And the Ninth Circuit has held that the  
 11 FAA does not create an implied right of action. *G.S. Rasmussen & Associates, Inc. v.*  
 12 *Kalitta Flying Service, Inc.*, 958 F.2d 896, 902 (9th Cir. 1992) ("[W]e have previously held  
 13 that there is no implied private right of action under the Federal Aviation Act. We reach  
 14 the same conclusion . . . where plaintiff's claim is grounded in the regulations rather than  
 15 the statute itself." (citation omitted)).

16           This leaves Saliba's duty-of-fair-representation claim. A union has a duty to fairly  
 17 represent all employees within the bargaining unit. *Demetris v. TWU*, 862 F.3d 799, 804-  
 18 05 (9th Cir. 2017). A union breaches this duty when it acts arbitrarily, discriminatorily, or  
 19 in bad faith. *Id.* at 805. This standard is highly deferential to the union, especially when the  
 20 challenged conduct involves a union's judgment. *Id.* This is so because unions must  
 21 balance the interests of individuals and of the group as whole but pursuing every  
 22 individual's goals would make it impossible to effectively pursue the broader goals of the  
 23 entire group. Therefore, absent discrimination or bad faith, courts defer to a union's  
 24 judgment because "[a union] must be able to focus on the needs of its whole membership  
 25 without undue fear of lawsuits from individual members." *Herring v. Delta Air Lines, Inc.*,  
 26 894 F.2d 1020, 1023 (9th Cir. 1990).

27           Here, it is implausible that APA acted arbitrarily, discriminatorily, or in bad faith  
 28 when it refused to oppose American's mask policy or to advance Saliba's idiosyncratic

1 view of FAA regulations. American's mask policy was generally consistent with those  
2 adopted by the federal government, as well as many state and local governments. It also  
3 was based on a scientific consensus that wearing masks helps reduce the transmission of  
4 COVID-19. Saliba might disagree with the science, but his disagreement does not make  
5 APA's endorsement of American's mask policy arbitrary, discriminatory, or in bad faith.

6 Likewise, it is implausible that APA's refusal to advance Saliba's preferred defense  
7 at his disciplinary hearing was arbitrary, discriminatory, or in bad faith. The two merely  
8 had a disagreement over the proper reading of the relevant FAA regulations. These types  
9 of differences of opinion are insufficient to support a breach of the duty of fair  
10 representation claims. *See Conkle v. Jeong*, 73 F.3d 909, 915-16 (9th Cir. 1995). This is  
11 especially true here, where Saliba's interpretation of FAR § 61.53 is idiosyncratic and  
12 almost certainly incorrect. That regulation provides, in relevant part:

13 [N]o person who holds a medical certificate issued under part  
14 67 of this chapter may act as pilot in command, or in any other  
15 capacity as a required pilot flight crewmember, while that  
16 person:

17 (1) Knows or has reason to know of any medical condition that  
18 would make the person unable to meet the requirements for the  
19 medical certificate necessary for the pilot operation; or

20 (2) Is taking medication or receiving other treatment for a  
21 medical condition that results in the person being unable to  
22 meet the requirements for the medical certificate necessary for  
23 the pilot operation.

24 14 C.F.R. § 61.53. Nothing in this section even arguably gives Saliba the unilateral  
25 authority to decide whether to comply with a mask mandate policy, especially when that  
26 policy did not require him to wear a mask while actually piloting the airplane from the  
27 flight deck.

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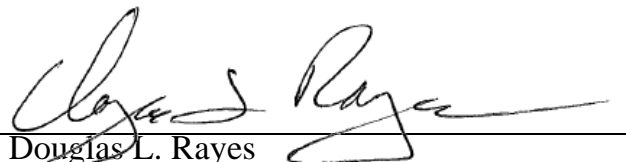
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1 For these reasons,

2 **IT IS ORDERED** that APA's motion to dismiss (Doc. 9) is **GRANTED**. The Clerk  
3 is directed to terminate this action.

4 Dated this 27th day of March, 2023.

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8 Douglas L. Rayes  
United States District Judge  
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